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No. 98-1047

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

LOUIS R. KOERNER, JR. and MICHAEL SAMPSON, SR.

Petitioners,

vs.

CRESCENT CITY EMERGENCY MEDICAL SERVICES, INC., d/b/a MEDIC ONE; MEDIC ONE AMBULANCE SERVICE, INC., AMERICAN MEDICAL RESPONSE, INC., JERRY VARANAY; SUE BIROU; BONNIE EDWARDS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS MEDIC ONE AMBULANCE SERVICES, INC., AMERICAN MEDICAL RESPONSE, INC., JERRY VARANAY AND SUE BIROU

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STATEMENT PURSUANT TO RULE 29.6

In accordance with Rule 29.6 of the Supreme Court of the United States, respondents state that the parent company of Medic One Ambulance Services, Inc. and American Medical Response, Inc. is Laidlaw, Inc., a company which issues shares to the public.

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STATEMENT OF THE CASE

A. Introduction.

The petition misstates facts and misconstrues both the Fifth Circuit's holding and those of other circuits that purportedly "conflict" with the opinion below.

To fully understand the futility of petitioner's claim, it is necessary to briefly trace the procedural history of this case, which includes other suits filed by petitioner that arose from the same allegation of fraud. In October of 1990, Priority E.M.S. ("Priority") filed two suits against its competitor, Crescent City E.M.S., Inc. ("Crescent City"), in Louisiana state court, alleging unfair trade practices. Crescent City was accused of filing fraudulent claims for reimbursement for unnecessary ambulance services rendered to dialysis patients at Charity Hospital in New Orleans.

On November 7, 1991, the president of Priority, Michael Boatright, and his attorneys, Michael Piper and Louis Koerner, petitioner, incorporated Federal Recovery Services, Inc. ("FRS"). Just five days later, FRS filed a sealed complaint attempting to state a claim in the name of the United States of America against Crescent City, and other defendants ("Koerner I"). On March 3, 1993, the United States elected to intervene in the suit pursuant to 31 U.S.C. § 3730(b)(4), which gave the United States control over the litigation. Nevertheless, two and one-half years after filing the complaint, FRS attempted to amend the complaint to allege additional fraudulent actions by Crescent City.

On June 2, 1993, Crescent City moved to dismiss FRS for lack of subject matter jurisdiction because it was not the original source of the information, inasmuch as Priority had filed a state

case alleging the same facts in 1990. In an attempt to cure the jurisdictional defect, FRS filed a motion to substitute Boatright as the relator. The District Court denied the motion to substitute Boatright and granted Crescent City's motion for dismissal.

The United States then proceeded against Crescent City. Before trial, a settlement was reached in which Crescent City paid the United States over $1.8 million, and the suit was dismissed pursuant to Rule 41(1)(1)(ii) of the federal Rules of Civil Procedure. The United States agreed to pay FRS, Boatright, Koerner, and Piper 10% of the proceeds recovered ($186,250) from Crescent City which released their claims against the United States.

That same day, FRS and Boatright, after having been dismissed from Koerner I for over a year, sought reconsideration of the motion that had dismissed them from the suit against Crescent City. This motion for reconsideration was denied. Additionally, Koerner and Piper filed motions for attorneys fees in excess of $190,000. The court held that they were not entitled to attorneys' fees because FRS was not a proper party, and noted that there had been no finding that Crescent City had violated the False Claims Act. Koerner and Boatright subsequently appealed the dismissal of FRS, the denial of substituting Boatright as the relator, and the denial of attorneys fees.

The Fifth Circuit Court of Appeals held that pursuant to 31 U.S.C. § 3730(d)(1), FRS was not a proper party, and accordingly, Koerner and Piper were not entitled to attorneys fees and expenses. The court further held that, because Priority had filed suit in state court a year prior to FRS's suit, the information contained in Koerner I were "public disclosures" within the meaning of the statute. FRS admitted as much in its Motion to Partially Lift Seal, filed on August 10, 1992, noting that

> [t]he claim of Priority E.M.S., Inc. against Crescent City E.M.S., Inc. for unfair trade practices is based upon the same factual matters as the claim against Crescent City E.M.S., Inc. in this proceeding.

FRS argued that there was only one common instance of fraud shared by the cases, and that the federal case alleged additional instances. The court disagreed because the *qui tam* action was based, even if only partly, upon publicly disclosed information, and FRS could not avoid the jurisdictional bar simply by adding other claims substantively. The court held that FRS was not the "original source" even if additional, but similar, information was uncovered by FRS. Additionally, the court noted that FRS had not provided the information to the Government prior to filing suit, as required by 31 U.S.C. § 3730(e)(4).

The court stated in *Federal Recovery Services, Inc. v. United States*, 72 F.3d 447, 453 (1995), that "FRS's origins and capital structure suggest that the attorneys created FRS to control the proceeds of this litigation." The subsequent case history underscores the truth of the court's observation, and what is motivating petitioner's request for review. The court admonished the attorneys by stating that "a lawyer must represent his client's interest, not his own. The attorneys' effort to control Boatright by creating FRS overreached, and the resulting loss of counsel fees is its price." *Id.*

In September of 1994, prior to the Fifth Circuit's ruling in Koerner I, Crescent City sold the assets of its New Orleans based Medic One Ambulance operations, as well as the right to use the name "Medic One," to Medic One Ambulance Services, Inc. (Medic One), an affiliate of American Medical Response, Inc. (AMR). Medic One subsequently hired most of the employees of Crescent City's ambulance operations in New Orleans.

In March of 1995, some nine months prior to the Fifth Circuit's ruling in the Federal Recovery Services case ("Koerner I"), Koerner filed his second *qui tam* suit against Crescent City and Jerry Varanay. This second *qui tam* suit (Koerner II) also named as additional defendants, Medic One, AMR, Birou and Edwards. In Koerner II, Koerner alleged that he (Koerner) obtained the information upon which Koerner II was based from Sampson, a former employee of Crescent City when it did business as Medic One, and from Koerner's own investigation. Koerner additionally alleged that he (Koerner) was the original source to the United States of the information set forth in Koerner II, and further that

> the Medic One defendants, throughout a period beginning no later than June, 1993, to the personal knowledge of Michael Sampson, Sr. and on information and belief, beginning on October 1, 1990, and continuing through the period thereafter until the present, presented and/or caused to be presented false and/or fraudulent claims to the United States of America . . .

At the evidentiary hearing held on August 28, 1996, in Koerner II, Sampson testified that he did not commence work for Crescent City until June of 1993, and his attorney (Koerner) stipulated that Sampson did not have personal knowledge of fraudulent claims being made to the government after his termination in August of 1994, one month prior to Crescent City's sale of its ambulance related assets to Medic One. Sampson additionally testified that he (Sampson) had authorized Koerner to file Koerner II in his (Sampson's) name, and that prior to the filing of this suit he (Sampson) had not submitted any documents or other information to the U.S. government.

Just as in Koerner I, Koerner attempted to cure the jurisdictional defect in Koerner II (lack of standing as an

original source) by swapping plaintiffs. The trial court rejected Koerner's attempt to substitute Sampson as relator, and dismissed the Complaint in Koerner II for lack of subject matter jurisdiction. Additionally, the trial court imposed monetary sanctions against Koerner pursuant to FRCP Rule 11 in the form of attorney's fees and expenses. Koerner appealed the dismissal in Koerner II. The Fifth Circuit, in an unpublished opinion (See Appeal No. 96-31126), dismissed Koerner's appeal as being frivolous, and issued a sanction warning to Koerner relative to the filing of future frivolous appeals.

On the same day that Koerner filed a notice of appeal in Koerner II (October 28, 1996), he filed a third *qui tam* suit (Koerner III) under seal. The Complaint in Koerner III was nearly identical to the Complaint in Koerner II, the only differences being a change in plaintiff from Koerner to Sampson, and a shortening of the time frame of the alleged Charity Hospital Bribery Scheme to coincide with Sampson's employment with Crescent City from June, 1993 until August, 1994. The bribery schemes alleged in Koerner II and III were mere continuations of the scheme alleged in the state court suits filed in 1990. The document submissions made by Sampson to the government in connection with Koerner III occurred over five years after the public disclosures made in the state court suits, and were "based upon" said disclosures. At the evidentiary hearing held by the trial court in Koerner II, Sampson admitted that prior to retaining Koerner, he (Sampson) had discussed with Michael Boatright the allegations of illegal ambulance transports contained in Koerner I, as well as in Boatright's two prior state court suits. The duration of the scheme alleged by Sampson in Koerner III (June, 1993 to August, 1994) is overlapped by the time period alleged in Koerner I (January, 1989 to September, 1994).

Again, the District Court dismissed Koerner III for lack of subject matter jurisdiction, and imposed monetary sanctions

against Koerner pursuant to Fed. Rules of Civ. Proc. Rule 11 in the form of attorneys fees and expenses. Once again Koerner appealed. The Fifth Circuit had already warned Koerner that "any future frivolous appeal filed by him or on his behalf will invite the imposition of sanctions." *United States v. Crescent City E.M.S.*, No. 96-31126, slip op. at 2 (5th Cir. Aug. 19, 1997). The appeal of the dismissal of Koerner III and the trial court's imposition of sanctions was upheld, with the Fifth Circuit additionally imposing its own sanctions of double costs and attorneys fees in defending the appeal, and remanding the case to the trial court for determination of costs and fees. Koerner filed an Application for Panel Rehearing asking that the Fifth Circuit determine the amount of sanctions to be awarded and indicating that attorneys fees of $7,224.61 was an appropriate amount. The Fifth Circuit granted Koerner's Application for Panel Reconsideration and awarded attorneys fees in the exact amount that Koerner had stated was a fair award.

B. The Petition Misrepresents the Statement of the Case.

Petitioner continually states throughout his Petition that Michael Sampson was the "original source" for the Complaint in Koerner III, based on petitioner's misguided belief that the only defect in subject matter jurisdiction was that the Government had not received the information forming the basis of the Complaint prior to its filing. However, this is a misstatement: Sampson never was, nor could be, the original source of Koerner III. Koerner III is based on the exact same facts as the state court cases filed by Priority in 1990, only the names and dates have changed. To be the original source, Sampson must have "sounded the alarm, not merely echoed it."

The District Court and the Fifth Circuit Court of Appeal have repeatedly told petitioner that all complaints subsequent

to the state court suits that stem from the same allegations are based on publicly disclosed information. Petitioner just does not seem to understand that he has already gotten his one bite of the apple.

Petitioner states that it is "clearly erroneous" that Sampson did not notify the Government until six years after the same information had been publicly disclosed. This is a misstatement and a red herring. The information on the Medicaid scheme was publicly disclosed when the state court suits were filed in 1990. Sampson sent his information, which was based on the same facts and allegations, by petitioner's own admission, in 1996. Therefore, it is a fact that Sampson notified the Government six years after the information had already been publicly disclosed in the state court suits.

Koerner states that Sampson had personal knowledge of how the scheme to defraud Medicaid worked, and that knowledge proves that he was the original source. What Koerner conveniently omits is that Sampson met with Boatright, who explained the fraudulent scheme to him, prior to the filing of Koerner II. Petitioner claims that Sampson demonstrated to the District Court that he was an original source. Yet, petitioner contradicts this claim with the sworn testimony that he includes from the district court hearing in which Sampson testified that he spoke to Boatright about Boatright's lawsuit against Crescent City.

Nevertheless, all these arguments are red herrings because Sampson is not an original source as contemplated by 31 U.S.C. § 3730(e)(4). Every federal complaint filed alleging fraudulent ambulance transports of dialysis patients from Charity Hospital, whether filed by Priority, Koerner himself, or Sampson, have no subject matter jurisdiction, because the fraud was publicly disclosed in the state court suits filed with Koerner as attorney

for Boatright. The District Court and the Fifth Circuit have explained, again and again, to petitioner, that there can never be subject matter jurisdiction on the same allegations for the above reasons. Yet, petitioner repeatedly attempts to enter the federal courts by any door he can find, only to have that door shut over and over again.

C. The Petition Misrepresents the Facts of the Case.

Although petitioner misconstrues a multitude of the facts, only those of moment will be addressed in this section. Petitioner states that Sampson had notified the Government prior to his (Koerner) filing Koerner II. This is false. Petitioner evens admits that he, not Sampson, sent the information to the government. Merely because duplicate materials were sent about a year and a half later by Sampson does not alter the fact that Koerner, not Sampson, sent the information to the Government in Koerner II. Then, petitioner falsely states that Sampson refused to authorize the filing of the *qui tam* suit, despite the fact that Sampson had testified otherwise. These facts are false and irrelevant, as there was no subject matter jurisdiction because the information had already been publicly disclosed. Petitioner's credibility based on these misrepresentations is suspect.

D. The Petition Misstates the District Court's Reasons for its Judgment.

Koerner asserts that the trial court refused subject matter jurisdiction in Koerner II, and did not find Sampson to be an "original source" because the information contained therein had not been provided to the Government prior to his filing suit as required by 31 U.S.C. § 3730(e)(4)(B). Koerner alleges that the trial court erred in this finding because he had sent the Government the material. The argument is without relevance

because the District Court never ruled on, nor even addressed, whether Sampson was an original source. Rather, it held that Koerner, who had filed the suit, was not an original source, and that adding Sampson as plaintiff could not cure the jurisdictional defect, and that the events alleged in Koerner II were derived from and based on the earlier publicly disclosed allegations in the FRS suit.

REASONS FOR DENYING THE WRIT

I.

THE PETITION MISSTATES RULE 38, AND PETITIONER HAD BEEN PROVIDED NOTICE.

Petitioner avers that the appellate court was without authority to award sanctions against him because "there was no separately filed motion or notice form [sic] the court and reasonable opportunity to respond." Petitioner's argument is without merit because he had received notice.

Federal Rule of Appellate Procedure 38 provides as follows:

> If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

Fed. Rule App. Proc. Rule 38.

Koerner received notice on more than one occasion and had more than a reasonable opportunity to respond to the court's imposition of sanctions for filing a frivolous appeal. As this

Court stated in its ruling when the sanction was imposed, Koerner had been cautioned in Koerner II (Appeal No. 96-31126) that "any future frivolous appeals filed by him or on his behalf will invite the imposition of sanctions." Koerner II, Slip. Op. at 2. Furthermore, in the Application for Panel Rehearing, Koerner *asked* the Fifth Circuit to "impose an amount of sanctions for the appeal on the appellate level and without a remand," and also requested that the court award sanctions in the specific amount of $7,224.61. In its ruling On Petition for Rehearing, the Fifth Circuit did precisely what Koerner himself had requested.

The Second Circuit Court of Appeals has held that warnings by the court that sanctions would be imposed for filing a frivolous appeal, based upon prior frivolous filings by the appellant, is adequate notice and the imposition of sanctions is proper. *Becker v. Adams Drug Co.*, 819 F.2d 32, 33 (2d Cir. 1987), *cert. denied*, 484 U.S. 1015, 108 S. Ct. 719, 98 L. Ed. 2d 669 (1988). Other circuits have held that an appellant's reply brief devoted to responding to appellee's request for sanctions and a request in opposing briefs for sanctions also constitute adequate notice. *Simmons v. Allstate Life Ins. Co.*, 65 F.3d 526, 531 (6th Cir. 1995); *Finch v. Hughes Aircraft Co.*, 926 F.2d 1574, 1583 (C.A.D.C. 1991).

Not only did Koerner have express notice in Koerner II that filing another frivolous appeal would result in an imposition of sanctions, he also had notice in this case, Koerner III, as evidenced by his unequivocal request to the court in his Application for Panel Rehearing to reconsider the sanction award. Therefore, the appellate court did have the authority to impose sanctions on petitioner.

II.

THE PETITION MISSTATES THE EXISTENCE OF A CONFLICT.

Petitioner seeks certiorari based on a conflict that does not exist. He asserts that the holding in *Federal Recovery Services, Inc. v. United States*, 72 F.3d 447 (5th Cir. 1995) specifically declined to follow the procedures to cure a subject matter jurisdictional defect as approved by *United States ex rel. Precision Co. v. Koch Industries, Inc.*, 31 F.3d 1015 (10th Cir. 1995). He avers that this, in turn, creates a conflict as to whether a mistake in subject matter jurisdiction can be rectified by subsequent compliance with the mandated procedure **by the original source**. (Emphasis added).

Petitioner's argument is without merit because the cases are distinguishable. The Fifth Circuit held that Boatright could not be added to create subject matter jurisdiction where none actually existed. *Federal Recovery Services, Inc. v. United States*, 72 F.3d at 453. The court noted that FRS had only incorporated five days prior to the filing of suit, and had made no showing that it had voluntarily provided the information to the Government before filing its action. *Id.* at 452, n.3. Such disclosure is needed:

> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and **has voluntarily provided the information to the Government before filing an action under this section which is based on the information** (emphasis added).

31 U.S.C. § 3730(e)(4)(B).

In *Precision*, the plaintiffs had supplied the government with the requisite information before filing the second suit. Therefore, by adding the two individuals who had uncovered the fraud to the second suit, the subject matter jurisdictional defect was cured. However, in *Recovery*, adding Boatright, who was the individual who had uncovered the fraud, as a plaintiff would not have made him an original source because 31 U.S.C. § 3730(e)(4)(B) requires voluntary disclosure to the government prior to filing suit in order for an individual to be considered an "original source."

Thus, the facts in the two cases differ significantly. Therefore, the Fifth Circuits' denying an amendment to add plaintiffs who could **not** cure the defect, is distinguished from the Tenth Circuit that allowed amending the Complaint which did, in fact, cure the defect.

III.

THE PETITION MISSTATES THE CONFLICT ON "ORIGINAL SOURCE."

Once again, in an attempt to create a conflict where none exists, petitioner misstates holdings on "original source." He claims that the appellate court in *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465 (9th Cir. 1996) reversed a District Court's finding that there was no personal knowledge, the plaintiff was not the original source, and that there was no subject matter jurisdiction. Actually, the above case affirmed the District Court's granting summary judgment. Petitioner apparently meant to refer to a previous appellate court ruling in the same case in which the plaintiff was found to be an "original source" because **prior disclosures had been based on his complaints**. These facts differ from Koerner II and Koerner III in which the prior disclosures were **not** attributed to disclosures by either Koerner or Sampson.

Also, the holding in *Cooper v. Blue Cross and Blue Shield of Florida, Inc.*, 19 F.3d 562 (11th Cir. 1994) does not conflict with the Fifth Circuit, despite petitioner's claim. In *Cooper*, the court held that "once a suit has been filed by a relator or by the government, all other suits against the same defendant based on the same kind of conduct would be barred." *Id.* at 567. This is exactly what the Fifth Circuit has consistently held. All of the suits, *i.e.* Koerner I, Koerner II, and Koerner III, allege ambulance fraud by the same ambulance companies who transported dialysis patients from Charity Hospital. Therefore, Sampson is not an "original source" even though he adds names of new patients and cites other instances of the same alleged fraudulent scheme.

Additionally, *Cooper* had a different outcome because the facts were different. Cooper had gathered evidence and contacted governmental representatives about the fraud prior to the hearings at which the fraud was publicly disclosed. In Koerner III, Sampson filed suit years after the state court suits had been filed, and only after he had discussed the suit with the original plaintiff, Boatright. Conversely, Cooper had investigated the fraud three years prior to the public disclosure, and had notified certain government officials prior to the public disclosure. Based on those reasons, the Court found that Cooper's information was direct and that he was an "original source." Sampson, on the other hand, had learned of the previous suit from Boatright well before Sampson filed Koerner III. The District Court and the Fifth Circuit were correct, under *Cooper*, in holding that Sampson is not an "original source." Petitioner claims there is no statutory basis for this conclusion. However, his claim ignores the fact the it is the court's obligation to interpret the law. The holding in Koerner III is based on the courts' interpretation of 31 U.S.C. § 3730(e)(4)(A), and what is required for a finding of "original source."

Finally, petitioner erroneously cites *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994) for support that Sampson was an original source. In *Springfield*, the court held that there had been no public disclosure because the previously disclosed information was "innocuous," "spotty," and "insufficient in itself to constitute an allegation of fraud." *Id.* at 657. That certainly was not the case in the state court suits filed by Boatright, Koerner, and Piper as it was prosecuted. Therefore, *Springfield* differs in fact from Koerner II and Koerner III, and does not create a conflict over the definition of "original source."

IV.

THE DISTRICT COURT CORRECTLY DISMISSED KOERNER III FOR LACK OF SUBJECT MATTER JURISDICTION.

Petitioner asserts that there was no authority for the District Court to dismiss a claim of an "original source," and therefore, the District Court went beyond its authority when it dismissed Koerner III. Petitioner then takes his argument one step further, and avers that because Sampson claimed to be an original source, petitioner's appeal of the District Court's ruling was not frivolous.

A. Sampson was not an original source.

Petitioner's argument ignores the obvious fact that Sampson was not an "original source" of the fraudulent scheme that had been prosecuted some six years prior to his filing suit in Koerner III. The District Court and the Fifth Circuit had made it abundantly clear to the petitioner that the *qui tam* action based on fraudulent ambulance services and claims for reimbursement had been settled. All other claims based on the

same allegations were barred because the court had no subject matter jurisdiction over such claims.

B. The petitioner's appeal was frivolous.

For petitioner to assert that his appeal was not frivolous after being admonished by the Fifth Circuit not to continue filing the same suit again and again is incredible. The amount of time that has been wasted by the courts, and the money spent by defendants is considerable in defending against the onslaught of copy-cat suits filed by Koerner. As the trial court aptly stated,

> The tortious trail swathed by Koerner in serially relating through himself and others allegations of false claims in triplicate has resulted in anything but a just, speedy, and inexpensive determination of the action.

(See Appeal No. 96-31126). The Fifth Circuit reviewed the pleadings of Koerner I, Koerner II, and Koerner III and found them to be almost identical. The Court also found that sanctions appears to be the only way to stop Koerner from filing replicate suits. It was correct in imposing sanctions.

CONCLUSION

Petitioner, after being warned and then sanctioned by the Fifth Circuit for attempting to file suit for which there is no subject matter jurisdiction, now attempts to misstate the facts and holdings in order to justify review by this Honorable Court. A reading of the pleadings and prior rulings makes it abundantly clear that petitioner is willing to waste the resources of the legal system in search of more money. In Koerner I he received a settlement from a suit alleging the same fraudulent scheme that he subsequently alleged in Koerner II and once again in Koerner III.

Petitioner has cited no compelling reason for review of the holdings of the lower courts. For the foregoing reasons, review by this Court is not necessary or appropriate and the writ of *certiorari* should not issue.

Respectfully submitted,

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